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TO: SUPERVISOR ZEV YAROSLAVSKY, Chairman
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FROM: LLOYD W. PELLMAN
County Counsel

RE: **Report on "RS 2477" Public Rights of Way on Federal Lands**

On April 2, 2002, on motion of Supervisor Antonovich, your Board requested that our office report on Revised Statute 2477 ("RS 2477") public rights of way issues on federal lands. That report is enclosed.

The request for this report was prompted by constituents in the Antelope Valley who have requested that the Board of Supervisors consider asserting rights in historic trails to prevent the possible loss of public access to these equestrian, hiking, and biking trails on federal lands within the County as a result of federal actions.

Specifically, we were asked to report on: 1) the background and history of public access over federal lands; 2) related litigation brought by the Southwest Center for Biological Diversity and others against the Bureau of Land Management and other federal agencies managing public lands in the County; 3) recent actions of neighboring counties related to RS 2477 issues and their impacts; and 4) options and recommendations relating to the possible assertion of RS 2477 rights for consideration by the Board of Supervisors.

Conclusions

A County assertion of RS 2477 rights would implicate matters of policy in the controversial areas of federalism and environmental protection. Supporters of RS 2477 rights generally include "home rule" proponents, off-road enthusiasts, equestrians, hikers, and similar groups. Opponents generally include environmentalists supporting the preservation of land for national parks and forests, and increased federal intervention for the protection of endangered species and conservation of natural resources on federal lands.

In order to accurately evaluate potential RS 2477 claims based on historic public trails on federal lands in the County, as well as the value of each route to the County trail system, the County would need specific information of the historic facts relevant to the assertion of rights established between 1866 and 1976 and before any federal dedication of the land for a public use.

Therefore, we recommend that a prudent course at this time would be to authorize the Department of Parks and Recreation, which manages the County's multi-use trail system, to work with local interest groups in the Antelope Valley to address this need for specific historical information and to have that department report back to the Board.

The enclosed report reviews each of the questions raised in the April 2, 2002, Board motion. If you have any questions concerning this matter, please contact me, John Krattli at (213) 974-1838, or Helen Parker at (213) 974-1889.

LWP:HSP:gl

Enclosure

c: David E. Janssen
Chief Administrative Officer

Violet Varona-Lukens, Executive Officer
Board of Supervisors

Timothy Gallagher, Director
Department of Parks and Recreation

REPORT ON RS 2477 PUBLIC RIGHTS OF WAY ON FEDERAL LANDS

BACKGROUND AND HISTORY OF "RS 2477"

RS 2477 Was an Express Offer by the Federal Government to Dedicate Rights of Way Across Federal Lands

RS 2477 was a federal statute in effect for 110 years, between its passage in 1866 and its repeal in 1976. Its continued importance arises from the fact that the 1976 repeal expressly "grandfathered," or reaffirmed, the validity of any rights of way in federal lands which the public had obtained during that period.

The United States Congress passed RS 2477 in 1866 to facilitate settlement of the West by encouraging the development of a system of roads and trails.

The statute provides: "The right of way for the construction of highways across public lands not otherwise reserved for public purposes is hereby granted."

RS 2477 was, essentially, an offer of dedication requiring acceptance of the offer to perfect the right of way. By its own terms, the offer of dedication only applied to all federal "lands not otherwise reserved for public purposes" at the time of acceptance. It was not limited to specific public lands, but applied to all federal lands, including areas now used for national parks, forests, and military bases. However, the offer of dedication could only be accepted before the federal government reserved a particular area for a public purpose.

Although RS 2477 was repealed in 1976 by the Federal Land Policy & Management Act ("FLPMA"), a savings clause protected all RS 2477 rights of way that were perfected prior to 1976.

The identification of these routes is complicated by the fact that, between the enactment of RS 2477 and its 1976 repeal, there was no procedure for asserting or claiming the rights of way. Federal regulations in place during those years acknowledged that the grant was self-executing, and that it was not necessary to provide notice to the federal government in order to accept the offer. When the offer of dedication was accepted by public use, a property right was automatically conveyed on behalf of the public.

In 1994, the Department of the Interior ("DOI") proposed new regulations to create an administrative process for "recognizing valid claims" to RS 2477 rights of way. The new regulations were widely criticized by RS 2477 proponents as contradicting many years of judicial precedent and creating a new system, whereby counties must submit and document right of way claims with the DOI having discretion to decide whether to recognize such claims.

In the face of this criticism and the legal and practical difficulty involved in implementing these regulations, in 1996, Congress announced a moratorium on the proposed RS 2477 regulations, as well as a requirement that any new regulations receive Congressional approval.

The moratorium is still in effect, and any new regulations will most likely be challenged in court. Currently, the federal government has taken the position that, generally no RS 2477 "claims" will be processed in the absence of final regulations. We anticipate that the resolution of these issues will take a considerable amount of time.

Some counties in western states are asserting, and attempting to prove that, because the regulations in effect at the time of acceptance of RS 2477 rights of way acknowledged that the acceptance was self-executing, the public's RS 2477 rights of way have already been perfected, and must be recognized by the federal government.

A Federal RS 2477 Offer of Dedication May Be Accepted by Public Use, But Acceptance into the County System of Highways Requires Affirmative Action

Case law has held that perfection of an RS 2477 right of way is a question of state law. The most relevant decision in California is *Ball v. Stephens* (1945) 68 Cal.App.2d 843. In *Ball*, a California appellate court found that Congress did not limit the methods to be followed in accepting the RS 2477 offer and establishing "highways" across federal lands. This California court found, consistent with other jurisdictions deciding the issue, that RS 2477 roads become "highways" for purposes of RS 2477 under the law of the state in which they are located.

The *Ball* court noted that acceptance of the RS 2477 offer of dedication could be manifested, and dedication effected, by the selection of a route and its establishment as a highway by a public authority. The court also found that, in the absence of action by the state legislature or a county board of supervisors, dedication for purposes of RS 2477 could be effected by its use by the public. Consistent with other jurisdictions deciding the issue, the *Ball* court found that it was not necessary for RS 2477 purposes, that public authorities take

any action. Rather, dedication and acceptance were questions of fact to be resolved by evidence of public use.

The court in *Ball* reviewed the long factual history of use of the mountain road in San Luis Obispo that was at issue in the case. The analysis indicates the intensive factual inquiry required to establish a claim pursuant to RS 2477. In *Ball*, the evidence indicated that the route had come into existence by use by hunters, miners, and vacationers prior to 1905. Travel by horse and wagons before 1910 and by vehicles thereafter was documented. The court found that when the owner of the land crossed by the road acquired title to the land, the owner took title subject to the dedication of the road for public use under RS 2477. The court affirmed the trial court's ruling that the private property owner was required to remove his gate and pay damages to the plaintiff, whose access to a mine had been blocked by the defendant's gate.

One of the unsettled issues in RS 2477 litigation is whether unpaved routes, such as trails, may qualify for RS 2477 protection, or whether construction, paving, grading, or some other physical alteration of the route is required to qualify as a historic "highway" for purposes of the assertion of these rights. In the most recent federal case on this issue, a federal district court in Utah determined that for purposes of RS 2477 claims, some form of purposeful physical building or improvement is required, even if state law permitted establishment of a right of way by continued public use alone. See *Southern Utah Wilderness Alliance and Sierra Club v. Bureau of Land Management, San Juan County et al.* (2001) 147 F.Supp.2d 1130.

Acceptance for the public for purposes of RS 2477 may not require affirmative county action, but acceptance as a county highway can only result from affirmative county action. Current California law provides by statute that a county must affirmatively accept a public or private road into the county highway system for that road to be considered to be part of the highway system. See Streets and Highways Code section 941. No county can be held liable for failure to maintain a road until it is formally accepted into the county road system. See Streets and Highways Code section 941. Unpaved historical trails may meet the definition of highways for purposes of RS 2477, although that issue may be litigated as well, as indicated by the recent case from Utah discussed above. We have confirmed with the Department of Parks and Recreation that the County of Los Angeles affirmatively accepts trails into its master plan of trails before accepting maintenance responsibility for them.

RELATED LITIGATION AGAINST FEDERAL AGENCIES

Recent Events Have Generated Increased Controversy Over RS 2477 Rights

The debate over RS 2477 has intensified due largely to two recent events which are anticipated to affect RS 2477 rights of way that currently exist, but which have not been recognized by the federal government.

First, the Southwest Center for Biological Diversity ("Center"), a conservation organization headquartered in Arizona, joined with the Sierra Club and other plaintiffs to bring litigation against the federal government. The Center has entered into settlement agreements with a number of federal agencies which require these agencies to increase protection of listed species under the Endangered Species Act ("ESA"). The settlement consists of several different agreements that require increased wildlife conservation in the California Desert Conservation Area ("CDCA"), as well as revision of the forest plans for the Southern California forests.

Second, the U.S. Department of Agriculture ("USDA") is promulgating new regulations applicable to "roadless" areas in National Forest System lands, in conjunction with forest plan revisions.

As part of the settlement with the Center, the Bureau of Land Management ("BLM") will increase protection for various federally protected species in the CDCA, such as the peninsular bighorn sheep, desert tortoise, and milkvetch plant. In addition, the BLM will expand critical habitat areas and increase protection of existing habitat. Accordingly, the BLM will implement road and/or trail closures on many miles of CDCA territory, and tighten restrictions on mining, livestock grazing, and off-road vehicle use.

The existing and anticipated route closures and other restrictions in the CDCA will primarily impact Imperial, Kern, Riverside, and San Bernardino counties, because these counties contain the largest areas of CDCA territory, populations of protected desert species, and critical habitat areas. In comparison, in Los Angeles County, comparatively smaller areas are included in the CDCA and contain desert tortoise and/or milkvetch habitat. The greater impact to Los Angeles County, in terms of federally managed properties, could arise from the proposed forest plan revisions, as well as the related federal road management policies.

The settlement also requires the USDA Forest Service ("Forest Service") and U.S. Fish and Wildlife Service ("FWS") to bring national forests into compliance with the ESA. When the Southern California forest plans were

originally approved between 1986 and 1989, the Forest Service was not required to consider the effect of forest plans on listed species. Since then, it has been determined that such consideration is required at the planning stage. Thus, the Forest Service and FWS have instituted temporary measures, such as forest road and facility closures, until the forest plan revisions can be completed to include long-term protection.

The Forest Service is scheduled to complete plan revisions for the Angeles, Cleveland, Los Padres, and San Bernardino National Forests by 2003. The Forest Service revisions will include updated management directives for species and habitat protection; roads, trails and public access; recreational activities; wilderness and roadless areas; and, other resource concerns. It is expected that forest plan revisions will provide increased protection for listed species, because, when the forest plans were completed in 1989, there were only 17 species listed as threatened or endangered. Currently, there are approximately 62 listed species. Los Angeles County will be impacted to the extent that the Angeles National Forest contains listed species and critical habitat.

In conjunction with forest plan revisions and to increase protection for listed species under the ESA, the USDA is developing new "roadless area conservation" rules and road management policies for national forest lands. After surveying all routes through the forest lands, the USDA established three road classifications: 1) classified; 2) unclassified; and, 3) temporary. Classified roads are all roads determined to be necessary for long-term motor vehicle access, and all roads otherwise authorized by the Forest Service. Unclassified roads are roads not managed as part of the forest transportation system, such as unplanned roads, abandoned travelways, and off-road vehicle tracks that have not been designated and managed as trails. Temporary roads are those roads the Forest Service has authorized by contract, permit, or other means, but not intended to be part of the forest transportation system and not necessary for long-term resource management.

Under new federal regulations, areas containing unclassified roads are deemed "inventoried roadless areas." Pursuant to the regulations, a road may not be constructed or reconstructed in inventoried roadless areas, unless the designated Forest Service officer finds that one of the specific listed exceptions is applicable. Inventoried roadless areas are subject to more stringent rules, and the USDA is promulgating new road management policies that will further restrict activities in inventoried roadless areas.

It is widely anticipated that the ESA settlements and forest plan revisions will impact all asserted RS 2477 rights of way that have not yet been recognized by the federal government. Since the moratorium on RS 2477 regulations is still in effect, the federal government has taken the position that it cannot respond to requests to recognize RS 2477 rights of way.

Therefore, the validity of asserted RS 2477 rights of way will remain unclear until the federal agencies' response to asserted RS 2477 rights is resolved. Since the proposed relevant federal regulations are the subject of a moratorium, we anticipate that federal court litigation against one or more federal agencies will be required to resolve this issue.

RELATED ACTIONS OF OTHER COUNTIES

Some California Counties Have Taken, or Are Contemplating Taking Action with Respect to RS 2477

At least three California counties, as well as counties in Utah, Arizona, and Nevada, are attempting to document the historical location and use of rights of way across federal lands within their counties. We have contacted staff in the County Counsel's office of each of these California counties in the preparation of this report.

These counties have taken the position that counties hold RS 2477 rights of way in all routes accepted by means of public use between 1866 and 1976, whether such routes are paved roads or unimproved hiking paths and trails. These counties are asserting their ownership of these rights of way so that they can then challenge federal action that results in the closure of those roads or trails.

Among the California counties, San Bernardino has been the most active in asserting RS 2477 rights. The San Bernardino County Board of Supervisors passed a resolution in 1993, recognizing the need for continuation of existing routes of travel throughout the East Mojave desert. That resolution did not specify particular routes. In 1995, the San Bernardino County Board of Supervisors authorized the Director of Transportation & Flood Control to file right of way assertions with the federal agencies in charge of various public lands in San Bernardino County.

In 1998, the San Bernardino County Board of Supervisors passed another resolution, this time identifying, mapping, and asserting rights of way in specific roads and trails. In 1999, a copy of the 1998 resolution was sent to the BLM, along with two letters asserting rights of way in specific routes in the Mojave and Death Valley National Preserves. In 2001, the San Bernardino County Board of Supervisors passed another resolution reasserting that county's

interest in RS 2477 rights of way. In December 2001, the BLM stated that it was unable to process San Bernardino County's "claim" of RS 2477 rights because the BLM had no regulations in place to resolve RS 2477 right of way claims. That BLM response states that there will be no processing of assertions of RS 2477 rights until final rules are effective, except in cases where there is a "demonstrated, compelling, and immediate need" to make such a determination.

We have been informed that the San Bernardino County Department of Public Works is engaged in the task of gathering the evidence necessary to prove the historical existence and use of the rights of way. The County Surveyor is responsible for surveying and documenting the rights of way.

The Kern County Board of Supervisors passed an RS 2477 resolution in February 2002. Like the most recent San Bernardino resolution, the Kern County resolution generally asserts an interest in all RS 2477 rights of way in Kern County. A copy of Kern County's resolution was sent to the BLM, but the BLM has not yet responded. We are informed that currently Kern County has no funding or procedure for surveying and documenting the specifics of its asserted rights of way.

We also have been informed that, in December 2001, a San Diego County Supervisor requested that County staff research RS 2477 issues as a potential means of re-opening roads or trails closed by the BLM.

EVALUATION AND RECOMMENDATIONS ON THE POTENTIAL ASSERTION OF RS 2477 ACCESS RIGHTS IN FEDERAL LANDS

Your Board has several possible options with respect to the assertion of RS 2477 rights. Your Board could: 1) decide not to assert any RS 2477 rights; 2) decide to adopt a resolution generally asserting rights without any specific information about potential RS 2477 routes and at a later time determine the specifics of each claim and how far to proceed in asserting the RS 2477 claim; or, 3) decide that the specific potential routes should be identified before determining whether to assert such rights.

We recommend the third alternative. Evaluation of the facts specific to each route with respect to its history, scope, and value to the public is important to determine the value of pursuing the assertion of RS 2477 rights. This evaluation can be a potentially resource-intensive effort.

A number of legal and practical issues will be raised if the County determines that it wishes to assert rights in historic rights of way in federal lands. One of the legal issues is whether or not the County can successfully assert RS 2477 rights for public use recognized by the federal government, but also

avoid accepting that right of way into the County system of trails for purposes of liability for maintenance or liability for injuries occurring on those rights of way. In California, some governmental immunities from liability for personal injury claims might apply to some public recreation trails, but the characteristics of the specific trail govern the application of these immunities.

These issues have not been settled. The county governments which have asserted RS 2477 rights of way have different approaches. In the San Bernardino and Kern County resolutions asserting these rights, the resolutions assert acceptance of the routes for RS 2477 purposes, but do not accept the maintenance responsibility which would follow a designation as an official road of these California counties pursuant to state law. In Utah, we are informed that the counties have generally accepted these claimed routes as roads, but the state law was amended to provide that not all roads in the system must be maintained.

The equestrian trail advocates in the Antelope Valley who have raised the RS 2477 issue have expressed in general terms their concern about recent actions by the federal government, particularly the BLM, that have closed or threatened the closure of rural areas and routes in the interests of environmental protection.

Currently, it is difficult to evaluate the impact of RS 2477 issues in Los Angeles County due to the lack of information regarding what specific trails in federal lands might be historic trails accepted by public use between 1866 and 1976 and prior to federal set aside of those properties for public uses, and regarding which of those might be the subject of past or threatened federal closures.

In order to accurately evaluate potential threats to historic public trails on federal lands in the County, as well as the value of each route to the County trail system, the County would need specific information of the historic facts relevant to the assertion of rights established between 1866 and 1976 and before any federal dedication of the land for a public use.

This specificity is also required to evaluate what, if any, environmental impact may occur if these rights are pursued. If the federal government is closing areas with potential RS 2477 routes, there is often a claimed environmental basis, such as the ESA, for that decision. It is unclear if the assertion of any specific right of way in federal land requires independent environmental compliance under state and federal law to evaluate the environmental impact of that assertion of rights.

We believe that local groups of trail users and local historians in the impacted areas are among the very best sources of information which can focus this review from general principles to specific cases. Local groups, including the constituents in the Antelope Valley who raised this issue in the context of equestrian trails, inform us that they have access to relevant maps and information. Some of the necessary information is probably readily available from these groups, and, in addition, their members and contacts in the local community are in the best position to obtain additional information available from historical records and from area residents. Through such local sources of information on historic trails, the County would be in a better position to determine whether a County assertion and claim of RS 2477 rights would benefit the County's public hiking and equestrian trail system.

Therefore, we recommend that a prudent course at this time would be to authorize the Department of Parks and Recreation, which manages the County's multi-use trail system, to monitor the status of this issue at the federal level and to work with the local interest groups in the Antelope Valley to address the need for specific historical information to evaluate a potential assertion of RS 2477 rights for specific historic trails in that area.

The Department would then be able to report back to the Board on the results of that effort. We have consulted with the Department of Parks and Recreation, and they concur in this approach.